

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

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Federal-State Joint Board on)

Universal Service:)

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CC Docket No. 96-45

Promoting Deployment and Subscribership)

in Unserved and Underserved Areas,)

Including Tribal and Insular Lands)

COMMENTS OF WESTERN WIRELESS CORPORATION

Western Wireless Corporation ("Western Wireless") files Comments on the Further Notice of Proposed Rulemaking in this proceeding 1/ to identify barriers to the deployment of wireless telecommunications services in unserved and underserved areas, including tribal and insular lands. The FCC has recognized the vital role wireless telecommunications services can play in this context, and in particular the significant steps taken by Western Wireless to improve telephone penetration rates in rural areas, including Indian reservations. 2/ Western Wireless would like to expand its efforts to bring affordable telephone service to reservations, but, as explained herein, faces significant regulatory barriers.

1/ *Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Further Notice of Proposed Rulemaking, FCC 99-204 (rel. September 3, 1999) ("FNPRM").

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The FCC's efforts to address these barriers in this FNPRM and in the WTB FNPRM have already increased awareness of the unique telecommunications issues facing Indian reservations, and the proposals provide the vehicle for the reservations to gain access to the information highway. Due in large part to the FCC's efforts to bring affordable telephone service to the reservations, and Western Wireless' cellular footprint covering 85-plus reservations and Indian communities, Western Wireless has undertaken significant steps to bring affordable telephone service to reservations. In fact, as the first step in the process, Western Wireless has filed a petition to be designated as eligible for the universal service support necessary to serve the Crow Reservation in Montana. 3/

Given the geographic and population characteristics of tribal and insular lands, the federal universal service program must be a central component in policies to spur improved basic telephone service in these areas, as the FNPRM recognizes. Western Wireless' comments here outline steps the FCC can take to optimize the manner in which its universal service program can aid in improving tribal telephone penetration rates.

2/ See *Extending Wireless Telecommunications Services to Tribal Lands*, WT Docket No. 99-266, Notice of Proposed Rulemaking, FCC 99-205 at ¶¶ 5-8 (rel. August 18, 1999) ("WTB NPRM").

3/ See *Western Wireless Corporation Petitions for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Services Eligible for Universal Service Support to Crow Reservation, Montana*, CC Docket No. 96-45, Public Notice, DA 99-1847 (rel. September 10, 1999) ("Crow Petition").

I. WIRELESS TELECOMMUNICATIONS PROVIDERS ARE WELL-SUITED TO PROVIDE SERVICE TO RESERVATIONS

Wireless technologies can often be more economical than traditional wireline technologies in overcoming the geographic, population density, and infrastructure challenges facing tribal areas. 4/ The FCC must adopt universal service measures 5/ to spur deployment of *wireless*, as well as wireline, telecommunications services in tribal areas in order to attain the goals of this proceeding.

Wireless universal service would be extremely beneficial on Indian reservations, where telephone penetration is particularly low. A recent survey conducted by Western Wireless, drawing information directly from tribal government officials from fourteen tribes regarding telephone service on their reservations, 6/ shows an average telephone penetration rate of 47% for these

4/ See WTB Tribal NPRM at ¶ 8 and n.16 (*citing* Letter from David L. Sieradzki, Counsel for Western Wireless, to Magalie Roman Salas, Secretary, FCC, dated July 15, 1998, at 18-20).

5/ Under Section 214(e) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 214(e), wireless providers must, where qualified, be designated as eligible telecommunications carriers ("ETCs") to participate in the federal universal service program. See also *Federal-Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, ¶¶ 145-47 (1997); Seventh Report and Order and Thirteenth Order on Reconsideration, 14 FCC Rcd 8078, ¶ 72 (1999).

6/ The Attachment to these comments includes further information on the survey, which was conducted by Western Wireless' special advisor on tribal matters, Charles Blackwell, Esq. (Chickasaw/Choctaw), director of Native Affairs & Development Group at Pushmataha House in Washington, D.C. Representatives of fourteen tribes (listed on the attachment), representing 46.7% of the present U.S. American Indian reservation land base and 31.4% of the enrolled American Indians living on reservations, completed the survey. The survey gathered information concerning reservation

tribes. In particular, the Navajo Nation, the largest tribe in the United States, with 17,630,000 acres and 228,010 people in 56,372 households, reports a shockingly low penetration rate of only 22.5%. The families and tribal citizens represented in these surveys have a common need for adaptable, affordable telephone service in their homes. Moreover, the survey shows that the responding tribes are united in their desire to have access to wireless residential service on the reservations.

Western Wireless is committed to working directly with tribal leaders and officials to deliver wireless telecommunications services on reservations. Western Wireless has taken steps to become eligible for federal universal service support to extend service to tribal lands, and intends to take additional similar steps in the future. By filing the Crow Petition, 7/ Western Wireless joins other carriers in proposing real-world wireless solutions for improving telephone service on Indian reservations. 8/ The record on the Crow Petition has been closed for some time, and the Commission should grant the petition expeditiously.

demographics and tribal economy, current telephone service, telephone service needs, and the tribes' interest in having residential wireless service in the homes on their reservations.

7/ See *supra* note 3.

8/ See Public Notice, *Petition of Smith Bagley, Inc. for Designation as an Eligible Telecommunications Carrier*, CC Docket No. 96-45, DA 99-1331 (rel. July 6, 1999).

II. THE FCC HAS AUTHORITY TO DESIGNATE AS ETCs THOSE CARRIERS PROVIDING SERVICE TO INDIAN RESERVATIONS

The FCC will do much to improve telephone service to tribal lands if it aggressively implements its Section 214(e)(6) jurisdiction to designate as ETCs "carriers not subject to state commission jurisdiction," such as those on Indian reservations. ^{9/} Because tribes have authority over certain aspects of telephone service on reservations, the FCC has jurisdiction to grant the ETC applications of carriers seeking to provide universal service on tribal lands. ^{10/}

The Supreme Court has indicated that a tribe has jurisdiction where Indian individuals or entities transact business on a reservation. ^{11/} A tribe also has jurisdiction where non-Indians transact business with other non-Indians on a reservation if the transaction significantly affects: (1) the political integrity of the tribe; (2) the economic security of the tribe; or (3) the health and welfare of the

^{9/} 47 U.S.C. § 214(e)(6); see FNPRM at ¶¶ 73-81.

^{10/} FCC jurisdiction over Indian reservation ETC designations would not divest state commissions of jurisdiction over carriers that serve or propose to serve areas beyond the reservations. States retain jurisdiction to designate ETCs (subject to their jurisdiction) on reservations where the service there is only incidental to a larger (*i.e.*, state-wide) overall universal service offering, while the FCC has jurisdiction to designate ETCs providing or proposing to provide universal service targeted to a reservation. State commission jurisdiction over all carriers as to non-ETC matters would, of course, remain unchanged.

^{11/} *U.S. v. Montana*, 450 U.S. 544, 564-65 (1980). In addition, where a non-Indian transacts business on the reservation with the tribe or its members, a tribe may usually regulate the transaction under a "consensual relationship" theory. See *id.* at 565.

tribe. 12/ Universal telecommunications service is integrally related to each of these factors, as the FCC has recognized. 13/ First, universal telecommunications service affects tribes' political integrity, consistent with the FCC's observation regarding the importance of telephone access to (and by) public officials to facilitate participation in the political process. 14/ Second, universal telecommunications is vital to economic security, given the importance of telephones to obtain jobs and the critical role that access to the Internet will play in the 21st century economy. 15/ Third, as the FCC has also noted, people with serious health problems are subject to significant medical risks if they lack easy access to telephone service. 16/ In addition, these factors are supported by the fact that the provision of universal service on reservations will often require the installation of facilities there, the

12/ *Id.*, 450 U.S. at 566.

13/ The FCC has already tentatively recognized this relationship. In the WTB NPRM, the FCC explains that "telephone service is a necessity in our modern society," WTB NPRM at ¶ 2, and the Commission has expressed the view that "lack of access to basic telecommunications services puts [] Indian communities at a tremendous disadvantage." FNPRM at ¶ 2.

14/ WTB NPRM at ¶ 2.

15/ *Id.*

16/ *Id.* Each of these findings, if adopted by the expert federal agency on telephone service, would be entitled to significant deference regarding the scope of tribal jurisdiction over telephone service on reservations. *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980) (when called upon to resolve issues of state versus tribal jurisdiction, the "inquiry is not dependent on mechanical or absolute notions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake[.]").

regulation of which falls squarely within the tribe's jurisdiction to manage lands within its borders. 17/ Thus, the FCC has jurisdiction to designate as ETCs carriers seeking to provide universal service on Indian reservations. 18/

III. THE FCC SHOULD REMOVE BARRIERS TO COMPETITION IN PROVIDING UNIVERSAL SERVICE TO HIGH-COST AND RURAL AREAS

Competitive carriers must be able to be designated as ETCs and receive universal service support in order to provide affordable service to the economically disadvantaged residents of rural areas, including Indian reservations. Thus, to facilitate competition and improve service in high-cost, rural areas, the FCC must ensure that new entrants are as readily able as ILECs to receive federal universal service support. This means, first, that the FCC must finish the process of eliminating the implicit subsidies that are available only to non-rural and rural ILECs and not to competitive entrants, and ensuring that any and all universal service support is explicit and portable. 19/ Second, the FCC must take action to

17/ *AB Fillins*, 12 FCC Rcd 11775, ¶¶ 11, 16 (1997).

18/ In implementing this regime (*i.e.*, to aid in line-drawing), the FCC could and should designate reservations (and incidental surrounding areas) as "study areas" for universal service purposes where requested by carriers seeking to enter those narrow markets. See FNPRM at ¶¶ 63-65.

19/ See Western Wireless Corporation Reply Comments on the CALLS Proposal in *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long Distance Users; Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-262, 94-1, 99-249 and 96-45, Notice of Proposed Rulemaking, FCC 99-235, filed December 3, 1999.

ensure that new entrants in high-cost and rural areas can receive ETC designation as readily as ILECs.

Unfortunately, experience since the adoption of the 1996 Act shows that wireless providers and other non-incumbents have faced much more intrusive and burdensome ETC designation proceedings than ILECs in most cases. The FCC should act to remedy this situation. In the case of applications for ETC designation by the FCC pursuant to Section 214(e)(6), the FCC should substantially expedite its process, and should strive to put ETC applications on public notice within 3 days of filing and to grant them within 60 days. In the case of applicants for ETC designation by state commissions, the FCC should adopt the following clarifications:

- (1) any carrier demonstrating the ability and commitment to provide the universal service functionalities defined by the FCC throughout the designated service areas should be granted ETC status;
- (2) there is no requirement to provide universal service ubiquitously *before* receiving designation;
- (3) states must follow the federally specified ETC criteria, and may not force new entrants to satisfy additional requirements such as "affordability" and "substitutability;"
- (4) states must process competitive entrants' ETC applications as expeditiously as those of ILECs; and
- (5) the public interest determination for designating ETCs in rural telephone company service areas should focus on the benefit that consumers could realize by the designation as an additional ETC.

The FCC has ample authority to adopt the proposals set forth above.

The Supreme Court recently upheld the FCC's Section 201(b) authority to adopt

rules regarding even those sections of the Act that states must implement. 20/ Nothing in the recent *Texas Office of Public Utility Counsel v. FCC* case 21/ undermines this conclusion. Although the Fifth Circuit reversed the FCC's statutory interpretation that the Act unambiguously bars states from adopting additional criteria, the court specifically declined to address the extent of FCC authority to adopt rules implementing Section 214(e). 22/ Rather, finding that the statute was not so clear, 23/ the Fifth Circuit left the door wide open for the FCC to adopt rules governing the states' designation of ETCs pursuant to Section 214(e). Such rules would be particularly appropriate given that the FCC's universal service support mechanisms comprise a *federal* program in which participation should be governed by a single *federal* standard that is well-specified and predictable. 24/

20/ *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721, 730 (1999). While that case related to the arbitration of interconnection disputes under Section 252, the same rationale applies to the designation of ETCs under Section 214(e).

21/ 183 F.3d 393 (5th Cir. 1999) ("*Texas OPUC v. FCC*").

22/ *Id.* at 417-18.

23/ *Id.* at 418 ("Nothing in the statute . . . speaks at all to whether the FCC may prevent state commissions from imposing additional criteria on eligible carriers.") (footnote omitted).

24/ 47 U.S.C. § 254(b)(5) ("There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.").

IV. CONCLUSION

In sum, given the critical need for competitive universal service offerings on Indian reservations and other rural, high-cost areas, the FCC should readily designate applicants for ETC authority on tribal lands pursuant to Section 214(e)(6), and should take other actions to ensure a competitively neutral system of designating ETCs and supporting universal service.

Respectfully submitted,

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ATTACHMENT

Summary of Survey of Reservations

The following reservations responded to the survey:

The Crow Tribe (Montana)
The Navajo Nation (Arizona/ New Mexico/ Utah/ Colorado)
Gros Ventre and Assiniboiné Tribes, Fort Belknap Indian Community (Montana)
The Kickapoo Tribe (Kansas)
Leech Lake Band of Chippewa Indians (Minnesota)
The Lovelock Paiute Tribe (Nevada)
The Northern Cheyenne Tribe (Montana)
Oglala Sioux Nation (S. Dakota)
Red Lake Band of Chippewa Indians (Minnesota)
The Rosebud Sioux Tribe (S. Dakota)
Shoshone Paiute Tribe (Nevada)
The Three Affiliated Tribes of Ft. Berthold Mandan, Hidatsa and Arikara (N. Dakota)
Turtle Mountain Band of Chippewa Indians (N. Dakota)
The Winnebago Tribe (Nebraska)

The 70 reservation-based tribes in Western Wireless' 19-state service area were invited to complete a survey concerning their existing telephone service, their telephone service needs, and their interest in having residential wireless service in the homes on their reservations. The survey included questions on reservation demographics, the tribal economy and current reservation residential telephone service. Each survey completed and returned was confirmed by further conversation with the person completing the form for the Tribe.

Fourteen tribes responded, providing a meaningful cross-section of reservation-based tribes in the western United States. The survey covers a land base of nearly 26 million acres – constituting 46.7% of U.S. reservation lands – with a total Indian population of 329,436 – representing 31.4% of the enrolled American Indian tribal population (based on the U.S. Department of the Interior's Bureau of Indian Affairs current population figure of 1,050,075 American Indians on or near reservations). The tribes range from the Lovelock Paiute Tribe, one of the smallest in the U.S. with 22 acres and 212 people in 45 households, to the Navajo Nation,

the largest in the U.S. with 17,630,000 acres and 228,010 people in 56,372 households. The surveys were completed by two tribal Chairmen, a tribal attorney, tribal planners, and tribal program administrators with direct knowledge of, and/or responsibility for, reservation telecommunications. Each tribe is federally recognized with inherent governmental authority and responsibility for the welfare of its people as an independent domestic sovereign nation, each administers and regulates activities on its reservation, and each presents unique geographic, governance and demographic characteristics.

In all, for these fourteen tribes, the average telephone penetration rate is a low 47%. None of the tribes owns its own telephone company. All share a desire to have affordable basic residential telephone service for their citizens. Moreover, they are united in their desire to explore wireless residential service for their reservation residences. A chart containing the quantitative results of the survey follows this discussion. Questions regarding the survey may be directed to Mr. Blackwell (202-546-6610 or nadg@erols.com) who will refer them to the appropriate tribal official.

TRIBE (STATE)	Land (acres)	Reservation Population	Homes on Reservation	Homes without Phones	Percentage of Homes Without Phones
Crow Tribe (MT)	1,200,000	10,000	1,700	1,105	65.0%
The Navajo Nation (NM/AZ/UT/CO)	17,300,000	228,010	56,372	43,688	77.5%
Ft. Belknap Indian Community (MT)	697,617	3,300	701	309	44.0%
Kickapoo Tribe (KS)	8,000	800	100	40	40.0%
Leech Lake Band of Chippewa (MN)	602,880	8,669	1,300	650	50.0%
The Lovelock Pauite (NV)	22	212	45	33	73.0%
Northern Cheyenne Tribe (MT)	450,000	4,500	1,500	1,050	70.0%
Oglala Sioux Nation (SD)	896,000	32,100	6,000	4,100	68.0%
Red Lake Band of Chippewa (MN)	800,000	7,200	1,600	640	40.0%
Rosebud Sioux Tribe (MT)	3,200,000	18,995	1,185	652	55.0%
Shoshone-Pauite (NV)	289,000	1,800	450	45	10.0%
Three Affiliated Tribes (ND)	93,700	4,600	1,400	900	64.0%
Turtle Mt. Band of Chippewa (ND)	140,000	8,000	4,800	1500	31.0%
Winnebago (NB)	27,500	1,250	247	123	50.0%
Totals	25,704,719	329,436	77,400	54,835	
Average					53.0%